

JUN 16 2006

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 5703

DATE FILED: Feb. 3, 2006

DATE ACTIVATED: May 1, 2006

DATE OF NOTIFICATION: Feb. 9, 2006

LAST RESPONSE REC'D: Feb. 23, 2006

EXPIRATION OF SOL: Sept. 2010

COMPLAINANT:

Richard T. Cassidy

RESPONDENTS:

Martha T. Rainville Congressional
Exploratory Committee and Kevin
Manahan, in his official capacity as treasurer

Martha T. Rainville

RELEVANT STATUTES:

2 U.S.C. § 431(2)

2 U.S.C. § 432

2 U.S.C. § 433

2 U.S.C. § 434

11 C.F.R. § 100.72

11 C.F.R. § 100.131

11 C.F.R. § 101.3

INTERNAL REPORTS CHECKED:

Disclosure Reports

EXTERNAL REPORTS CHECKED:

Vermont Secretary of State - Elections

I. INTRODUCTION

This matter concerns whether the Martha T. Rainville Congressional Exploratory Committee and Kevin Manahan, in his official capacity as treasurer ("the Committee")¹ and Martha T. Rainville (collectively, "Respondents") improperly used the "testing the

¹ At the time the complaint was filed, the Committee was called the "Martha T. Rainville Congressional Exploratory Committee," but amended its name to "Martha Rainville for Congress" as of February 14, 2006

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waters" exemption to raise money for her campaign for Congress. Based on the complaint, as well as review of other publicly available information, we recommend that the Commission find no reason to believe that Respondents violated the Act and close the file.

II. FACTUAL AND LEGAL ANALYSIS

The complaint alleged that Respondents violated the Act by raising funds for Ms. Rainville's campaign for the United States House of Representatives without registering with the Commission or filing the proper reports. The complainant claimed that Respondents raised funds in excess of what could reasonably be expected to be used for exploratory activities because (1) Respondents had raised more than \$100,000 between September 2005 and January 2006 and (2) the Committee received two checks that were designated for the general election campaign on its 2005 Year End Report. Respondents state that they timely filed all necessary reports. Review of the reports filed with the Commission found that the Respondents filed a Statement of Organization and the appropriate quarterly and year-end reports; therefore, the only issue is whether they timely filed the Form 2 Statement of Candidacy.

On September 12, 2005, Ms. Rainville filed a letter with the Commission, stating that she had not yet determined if she would be a candidate, but that she was filing the letter in lieu of Form 2 in order to name an exploratory committee. On September 13, 2005, the Commission received a Form 1 Statement of Organization naming the "Martha T. Rainville Congressional Exploratory Committee" as Ms. Rainville's principal campaign committee. The Committee thereafter timely filed a 2005 October Quarterly Report, a 2005 Year End Report, and a 2006 April Quarterly Report. On February 13,

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2006, Ms. Rainville publicly announced that she would run in the federal election to be held in September 2006. On that same date, Respondents filed a Form 2 Statement of Candidacy. The Committee's filings to date indicate that it raised approximately \$100,000 between September 2005 and February 13, 2006, and approximately \$300,000 total between September 2005 and the end of March 2006.

Under the Act, an individual becomes a candidate for federal office, triggering the Act's registration and reporting requirements, when his or her campaign exceeds \$5,000 in contributions or expenditures. 2 U.S.C. § 431(2). However, the regulations permit an individual who has not made the decision to run for office to raise funds to conduct activity integral to making that decision, or "testing the waters." 11 C.F.R. §§ 100.72, 100.131. Thus, while an individual is "testing the waters," he or she may raise or expend funds otherwise permissible under the Act for activities such as conducting a poll, making telephone calls and traveling. *Id.*

The regulations also provide that the individual becomes a candidate if he or she takes actions relevant to conducting a campaign, such as (1) using public general advertising to publicize his or her intent to campaign for federal office; (2) raising funds in excess of what could reasonably be expected for exploratory activities or undertaking activities designed to amass funds that would be spent after he or she becomes a candidate; (3) making or authorizing statements that refers to him or her as a candidate; (4) conducting activities in close proximity to the election or over a protracted period of time; or (5) taking action to qualify for the ballot under State law. 11 C.F.R. §§ 100.72(b), 100.131(b). At that point, the individual must file a Statement of Candidacy, Statement of Organization, designate a principal campaign committee, and

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1 file periodic reports required under the Act, including reporting all funds received from
2 the time the individual began "testing the waters." 2 U.S.C. §§ 432, 433, and 434.

3 Here, Ms. Rainville did raise more than \$5,000 and therefore was a candidate
4 under the Act. However, she also indicated that she had not yet decided whether she was,
5 in fact, going to run for office. Thus, she appears to have been operating under the
6 testing the waters provisions. Ms. Rainville filed a Statement of Organization for her
7 exploratory committee, and filed (although she was not yet required to) the quarterly and
8 year-end reports that would have been required to be filed under the Act once she became
9 a candidate. On February 13, 2006, after declaring her intent to run in the primary
10 election, Ms. Rainville amended her Statement of Organization to rename the Committee
11 and filed a Form 2 Statement of Candidacy. Thus, Ms. Rainville only would have
12 violated the Act if she had not been testing the waters and therefore should have filed a
13 Statement of Candidacy at an earlier time.

14 Looking at the criteria listed in 11 C.F.R. §§ 100.72(b) and 100.131(b), it does not
15 appear that Ms. Rainville took any actions that otherwise caused her to become a
16 candidate and required her to file a Statement of Candidacy with the Commission prior to
17 February 13, 2006. The complaint simply stated that the amount of money raised was
18 sufficient to indicate that Ms. Rainville had become a candidate because \$100,000 was in
19 excess of that which could reasonably be expected for exploratory activities. However,
20 the Commission previously has failed to find that an individual violated the testing the
21 waters provisions for raising similar amounts of money. *See, e.g.*, MUR 2710 (Judge
22 Harvey Sloane) (Commission recognizing that raising \$200,000 in funds while testing the
23 waters was not unusual, given the amount of money needed to fund a campaign for

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federal office); *see also* MUR 4809 (Ball) (raising approximately \$18,000 in contributions and making approximately \$7,400 in expenditures was insufficient to find that candidate was no longer testing the waters).² In addition to the total amount raised, the amount of money received by the Committee during the testing waters period (approximately \$100,000 through early February 2006) as a percentage or in comparison to Ms. Rainville's total receipts as reported in her 2006 April Quarterly Report (more than \$300,000 in the election cycle as of the end of March 2006) indicates that the amount received during the testing the waters period was not excessive for exploratory purposes.

Furthermore, the complaint did not state, and we have been unable to locate through public means, any other actions purportedly taken by Ms. Rainville or the Committee that could indicate that she had made a decision to run in the election. Newspaper reports did not indicate any public advertising run by Ms. Rainville or any public statements in which she referred to herself as a candidate. She did not conduct activities in close proximity to the election (the primary election will take place on September 12, 2006) or for a protracted period of time, and it does not appear that she undertook any activities to become a candidate under state law.

The complainant's allegation that the Committee reported in its 2005 Year End Report that it received two checks totaling \$4,000 that were designated for the general election (as opposed to the primary) is also insufficient to find that Respondents violated the Act. Receipt of those funds conceivably could be considered "undertaking activities

² The Commission has, on occasion, found that a candidate who raised amounts of money similar to Ms. Rainville was no longer testing the waters. However, in those cases, the dispositive fact was that the candidate had also made public statements referring to himself as a candidate. *See* MUR 5363 (Sharpton), MUR 5251 (Friends of Joe Rogers)

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1 designed to amass funds that would be spent after he or she becomes a candidate,”
2 thereby rendering her a candidate and no longer testing the waters. *See* 11 C.F.R.
3 § 100.131(b)(2). However, the fact that an individual received funds for the general
4 election does not *per se* render the individual a candidate. An individual who is testing
5 the waters is not prohibited from accepting such funds; she would simply be required to
6 report such funds if she decided to become a candidate. This is analogous to a situation
7 where a candidate has already chosen to run in the primary election and accepted funds
8 for the general election: that candidate is required to disclose the funds and allocate them
9 accordingly, but if the candidate does not win the primary election, she is required to
10 refund the funds. Similarly, Ms. Rainville accepted these funds and disclosed them
11 accordingly; if she did not run in, or ran in but did not win, the primary election, she
12 would be required to refund those funds.

13 We believe it appropriate, however, to look at the amount of funds accepted for
14 the general election and the number of occasions on which the individual accepted such
15 funds, to determine whether the individual evidenced the intent to generate funds to be
16 used in the general election, thereby rendering Ms. Rainville a candidate. Here, Ms.
17 Rainville accepted two checks for a total of \$4,000 designated for the general election
18 (out of a total of approximately \$100,000). The amount and number of checks designated
19 for the general election here does not indicate Ms. Rainville's intent to be a candidate.
20 Furthermore, while solicitation by the candidate or her committee of funds to be applied
21 to the general election may indicate her intent to be a candidate, there is no allegation
22 raised in the complaint and no indication through publicly available information that
23 indicates this was the case here.

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Overall, it does not appear that Respondents violated the Act by raising approximately \$100,000 over the course of six months while Ms. Rainville determined whether she would run for office and we recommend that the Commission find no reason to believe Respondents violated the Act.

III. RECOMMENDATIONS

1. Find no reason to believe that respondents violated the Act.
2. Approve the appropriate letters.
3. Close the file as to all respondents.

Lawrence H. Norton
General Counsel


Lawrence L. Calvert, Jr.
Deputy Associate General Counsel
for Enforcement

Date

6/16/06

BY:


Sidney Rooke
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